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No. 88-1205

In The

Supreme Court of the United States

October Term, 1988

TIMOTHY HAGGERTY,

Petitioner,

versus

CITY OF POMPANO BEACH,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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QUESTIONS PRESENTED (RESTATED)

I. IS A MUNICIPALITY PROHIBITED BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION FROM REGULATING THE HEIGHT AND SIZE OF THE SUPPORTING POSTS FOR A U.S. MAIL RECEPTACLE WHICH IS LOCATED IN THE PUBLIC RIGHT OF WAY.

II. DOES ENFORCEMENT OF A MUNICIPAL ORDINANCE WHICH REGULATES THE HEIGHT AND SIZE OF THE SUPPORTING POSTS FOR A U.S. MAIL RECEPTACLE LOCATED IN PUBLIC RIGHT OF WAY VIOLATE THE FIRST AMENDMENT.

RULE 28.1 LIST

Respondent, City of Pompano Beach is a municipal corporation established under the laws of the State of Florida. Respondent was the Appellant/Defendant in the court below.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

CONSTITUTIONAL AND STATUTORY PROVISIONS (NOT INLCUDED IN PETITIONER'S BRIEF)

39 U.S.C. Sec. 201. United States Postal Service.

There is established, as an independent establishment of the government of the United States, the United States Postal Service.

39 U.S.C. Sec. 401. General powers of the Postal Service.

The Postal Service shall have the following general powers:

. . . .

(2) to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title;

39 U.S.C. Sec. 403. General duties.

(a) The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees. The Postal Service shall receive, transmit, and deliver throughout the United States, its territories and possessions, and, pursuant to arrangements entered into under sections 406 and 411 of this title, throughout the world, written and printed matter, parcels, and like materials and provide such other services incidental thereto as it finds appropriate to its functions and in the public interest. The Postal Service shall serve as nearly as practicable the entire population of the United States.

(b) It shall be the responsibility of the Postal Service –

(1) to maintain an efficient system of collection, sorting, and delivery of the mail nationwide;

(2) to provide types of mail service to meet the needs of different categories of mail and mail users; and

(3) to establish and maintain postal facilities of such character and in such locations that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services.

(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such users.

DOMESTIC MAIL MANUAL, SECTION 111.1

111.1 General

This manual contains the regulations of the United States Postal Service governing its domestic mail services. These regulations include the rates for postage and restrictions on its use, descriptions of the classes of mail and special services and conditions governing their use, requirements for wrapping and mailing, explanations of collection and delivery services, and general provisions concerning the use of postal services and facilities.

DOMESTIC MAIL MANUAL, SECTION 151.1

151.1 Designation As Authorized Depository.

Every letterbox or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, highway contract route, or other mail route is designated an authorized depository for mail within the meaning of 18 U.S.C. sections 1701, 1705, 1708, and 1725, except that door slots, and nonlockable bins or troughs used in connection with apartment house mailboxes are not letter boxes within the meaning of 18 U.S.C. 1725 and not private mail receptacles within the meaning of 146.2. The post is not part of the receptacle.

DOMESTIC MAIL MANUAL, SECTION 155.232

155.232 Curbside Delivery.

Delivery may be provided to boxes located at the curb so they can be safely and conveniently served by the carrier from his vehicle.

DOMESTIC MAIL MANUAL, SECTION 155.27-155.272

155.27 Local Ordinances.

If a customer chooses not to erect a curbside box because of a local, city, county, or state ordinance prohibiting the installation of mailboxes at the curb, the delivery options in establishments and extensions are:

155.271 Central delivery services may be provided at one or more central points in a residential housing development, community or area, if:

a. The local postal managers approve the mailbox sites and equipment;

b. There is a minimum of two mailboxes erected at each mailbox site (there is no maximum limit); and

c. The customers are not required to travel an unreasonable distance to obtain their mail; or,

155.272 Post office box or general delivery service may be provided at the nearest postal facility where carrier delivery emanates.

DOMESTIC MAIL MANUAL, SECTION 156.531

156.531 Construction

Posts or other supports for rural boxes must be neat and of adequate strength and size. They may not be designed to represent effigies or caricatures that would tend to disparge or ridicule any person. The box may be attached to a fixed or movable arm.

STATEMENT OF THE CASE

The Petitioner, Timothy Haggerty, has placed on the Public right of way in front of his residence two different structures which he refers to as "mailboxes". The second structure which prompted this litigation consists of two truck engine blocks which serve as anchors for two and one-half inch water pipes that rise about fifteen feet in the air. Two horizontal bars are connected to the vertical pipes. The receptacle for mail is attached to the first horizontal pipe which is located about three feet from the ground, the second horizontal pipe is located several feet above the mailbox from which a two inch gas pipe rises into the air and functions as a flagpole. The first structure erected by the Plaintiff was similar in size and structure.

The City of Pompano Beach had in effect at the outset of the proceedings involving Mr. Haggerty an ordinance which prohibited structures in the right of way (Pompano Beach Code of Ordinances Section 100.35). The ordinance as originally drafted did not specifically address mailboxes but was interpreted and enforced by the City to allow a receptacle for the curbside delivery of mail in the right of way (The ordinance was amended by the City prior to the District Court of Appeal of the State of Florida Fourth District's review and the amended ordinance was before that Court. The amended ordinance specifically addresses mailboxes and permits them in the public right of way provided they do not exceed certain height and size limitations).

The City took the position that the structure was in violation of Sec. 100.35 of the Code of Ordinances based on the way the structure was fastened to the ground and the size of the structure. Mr. Haggerty was cited and a

non-jury trial was held before County Court Judge Mowry in June of 1983 at which time Mr. Haggerty's Motion to Dismiss on selective enforcement grounds was granted without prejudice. An appeal followed and the decision was reversed. Upon remand, a trial was held before County Court Judge June Johnson and Mr. Haggerty was found in violation of the ordinance. The City removed the Petitioner's structure.

Mr. Haggerty filed an appeal from the County Court decision, however, prior to the Appellate Court decision which reversed the lower court on double jeopardy grounds, Mr. Haggerty erected the second structure.

The City sent notices of violation for the second structure and the structure was removed and Mr. Haggerty then filed a complaint seeking a Declaratory Judgment and Injunctive relief. A non-jury trial was held and Circuit Court Judge Abel entered an Order permanently enjoining the City from enforcing its Ordinance against the Plaintiff and declaring the Ordinance invalid insofar as it purports to authorize the removal of the mailbox, its appurtenances and attachments.

Subsequent to the trial court decision and while the appeal was pending, the City Commission of the City of Pompano Beach amended Section 100.35 to exempt from the prohibition of structures in the public right of way, receptacles for the actual curbside delivery of mail as long as such receptacle does not exceed 5 feet in height and is securely mounted on posts no larger than 4 inch x 4 inch or 4 1/2 inch diameter standard steel or aluminum pipe buried no more than 24 inches in the ground and is

located in a manner which does not obstruct vehicular or pedestrian traffic or pose a public safety hazard.

The District Court of Appeal of the State of Florida Fourth District applied the revised ordinance and reversed the trial court.

REASONS FOR DENYING THE WRIT

I.

THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT A MUNICIPALITY FROM REGULATING THE HEIGHT AND SIZE OF THE SUPPORTING POSTS FOR A U.S. MAIL RECEPTACLE LOCATED IN THE PUBLIC RIGHT OF WAY.

In determining whether a state statute is preempted by federal law a two prong test has been developed - the first inquiry is whether Congress has prohibited state regulation, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309 (1977) and second, if Congress has not completely foreclosed state legislation, a state statute is void to the extent it actually conflicts with the federal statute, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, 98 S.Ct. 988, 994 (1978) and in determining whether there is a conflict the Court's primary function is to determine whether under the circumstances of the particular case, the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941). The issue sub judice is whether a municipal ordinance which prohibits structures in the public right

of way but allows an exception for receptacles for the curbside delivery of mail provided the post does not exceed certain size limitations violates the Supremacy Clause, Art. VI, Cl. 2.

Congress has been vested with the authority to establish post offices and post roads, U.S. Constitution, Art. I, Sec. 8, and pursuant to this authority Congress has established the United States Postal Service to conduct the postal services of the United States, 39 U.S.C. 201, and has given that body the power to adopt rules and regulations to accomplish its objective, 39 U.S.C. 401(2). The Postal Service pursuant to this grant of power, has enacted the Domestic Mail Manual which contains the regulations of the United States Postal Service governing its domestic mail service (Domestic Mail Manual 111.1). Chapter 155 of the Domestic Mail Manual provides the regulation for the City delivery of mail, Section 155.232 provides for curbside delivery as follows:

> Delivery may be provided to boxes located at the curb so that they can safely and conveniently be served by the carrier from a vehicle.

Section 155.27 of the domestic Mail Manual provides

> If a customer chooses not to erect a curbside box *because of local, county of state ordinance prohibiting the installation of mail boxes at curb,* the delivery options in establishments and extensions are: . . . (emphasis added).

Chapter 151 "Mail Receptacles" Subsection 151.1 provides:

> The post *is not* part of the receptacle (emphasis added).

Section 156.531

> . . . posts or other supports for rural mail boxes must be neat and of adequate strength and size. It may not be designed to represent effigies of caricatures that would tend to disparage or ridicule any person.

It is clear from the above cited regulations that not only has the postal service not intended to completely prohibit local regulation in the area of the placement of mail receptacles at the curbside but rather has also specifically recognized a municipality's authority to completely prohibit curbside mailboxes and provides for alternative delivery methods in this event. The postal service has also determined that the post is not part of the mail receptacle and that a mail box is a mail receptacle attached to a post of adequate strength and size to support the structure and therefore city regulations addressing the size of such posts and the depth of anchoring the same, do not conflict with the federal regulatory scheme.

The Fourth District Court of Appeals' opinion contains the following description of the Petitioner's structure: . . .

> Haggerty apparently dug a large hole between the sidewalk and street and placed therein two truck engine blocks. The engine blocks serve as anchors for two one and one-half inch water pipes that rise about 15 feet into the air. Two horizontal bars are connected to the vertical pipes. The receptacle to receive the mail is attached to the first horizontal bar approximately three feet from the ground. The second horizontal bar is located several feet above the mailbox. From the second bar, a two inch gas pipe functions as a flagpole, extending approximately another nine feet into the air. At its widest part the structure supporting the mailbox is five or six feet wide *City of Pompano Beach v. Haggerty*, 530 So. 2d 1023, 1023-1024 (Fla. 4th DCA 1988).

It is evident from the above description that the Petitioner's structure is much more than a mailbox but rather is a large contraption which incidentally contains a receptacle for the delivery of mail on it. To follow the Petitioner's preemption argument to its logical conclusion is to conclude that an individual is free to construct any structure he desires in disregard of all zoning, building, fire, health and safety codes upon any property he desires and by placing a receptacle for mail on the structure all governing jurisdictions except the United States Postal Service are preempted from enforcing any of the appropriate health and safety codes which would be applicable but for the placement of the mailbox. However, the general purpose of the Postal Authority is not to become involved in building, zoning and other public safety matters but rather is to plan, develop, promote and provide adequate and efficient postal services at fair and reasonable rates, 39 U.S.C. 403(a) and therefore the state regulation in this area does not stand as an obstacle to the accomplishment of the purposes and objectives of Congress.

The case of *Grover City v. United States Post Office*, 391 F.Supp. 982 (C.D. Cal. 1975) supports the city's view of lack of preemption in the case sub judice. The facts of the case involve an attempt by Grover City to prohibit all curbside mailboxes within the City. However, Grover City did not stop there but also attempted to *require* the postal authority to provide a certain type of mail delivery. The court held that since the United States Postal Service had regulations regarding the criteria for the types of delivery service it would provide to customers, the City was not free to dictate the type of delivery to be

provided by the Postal Service. The Court's rationale is premised on the doctrine of preemption as there was a clear conflict between the City's attempt to dictate the type of delivery and the postal regulations. However, the Court also stated:

> The Postal Service is taking no action to interfere with the enforcement of the enactment in question (prohibition of curbside mail boxes). All the postal service has done is to honor the choices made by its postal customers, continuing to offer curbside services to all eligible, but providing it only to those who comply with the conditions set forth in the postal regulations. In these circumstances, *it is clear that the postal service has not foreclosed the City from promulgating or enforcing its ordinance,* but rather has offered its customers the remaining delivery alternative without allowing the City to dictate or vary national delivery policy by means of a local enactment. *Grover* at 986. (Clarification, emphasis added).

The Court in *Grover City* held that a City may enact and enforce ordinances relating to mail boxes so long as such ordinances do not dictate or vary national delivery policy and the same principal is applicable to the situation at issue. The City of Pompano Beach has determined, in the exercise of its police power, that public right of way should remain open and available for its public purpose and has therefore prohibited the placement of private structures in the right of way. However, the City has also determined that the curbside delivery of mail serves a valid public purpose and has therefore authorized placement of receptacles for the delivery of mail in the right of way provided the mail receptacles do not exceed certain size restrictions nor obstruct vehicular or pedestrian traffic or pose a safety hazard. Such action on

the part of the City does not conflict with federal law as the United States Postal Service has specifically recognized the City's authority to completely prohibit curbside mailboxes in its jurisdiction and the City's restrictions on the size of the posts do not conflict with the requirement of the Postal Authority as the City's restrictions insure that the posts are of adequate strength and size to support the mailbox which is all the Postal Service requires.

II.

A MUNICIPAL ORDINANCE WHICH REGULATES THE HEIGHT AND SIZE OF THE SUPPORTING POSTS FOR A U.S. MAIL RECEPTACLE LOCATED IN THE PUBLIC RIGHT OF WAY DOES NOT VIOLATE THE FIRST AMENDMENT.

In *U.S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 1678 (1968) this Court set forth the following test to determine whether a governmental regulation which affects symbolic speech was justified:

1. Is the regulation within the constitutional power of government.
2. Does the regulation further an important governmental interest.
3. Is the governmental interest unrelated to free speech, and
4. Is the regulation no greater than essential to the furtherance of that interest.

The Florida Supreme Court held many years ago "where the dedication to the public use is made of the street or roadway and the same is used by the public, it is the *duty* of the City as a trustee of the public rights in and

to the streets within whose corporate limits they are, to maintain the public uses against encroachment." *Brickell v. Town of Fort Lauderdale,* 78 So. 681, 685 (Fla. 1918). Therefore it is within the constitutional authority of the municipality to regulate its public right of way.

The City of Pompano Beach has stated in the preamble to the latest revision of the ordinances (City of Pompano Beach Code of Ordinances Sec. 100.35) the following purpose for public right of way:

> It is to provide a way of passage for the public, and to provide an area for drainage, to provide an open area between the paved portion of the roadway and the placement of structures, to provide an area for the installation and maintenance of the public utilities and therefore to allow private structures to be located in the public right of way would defeat the purpose of public right of way.

The City Commission however in recognition of the valid public purpose and convenience of curbside mail delivery determined to exempt mail receptacles provided they did not exceed certain size limitations thereby defeating the purpose of public right of way. In *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118 (1984) a municipal ordinance prohibiting the posting of signs on public property was upheld and a determination was made that the city's interest in eliminating visual blight and promoting esthetics were sufficiently substantial governmental interests to justify the restrictions on the free exercise of expression. The Respondent city's interests in the matter at hand are likewise substantial and justify the incidental restriction on expression which results from the ban of private structures in public right of way.

The governmental interest is also unrelated to the suppression of free expression as the ordinance prohibits all private structures unless the structure is a receptacle for the curbside delivery of mail. The Petitioner takes issue with this part of the test based on the fact that the City's ordinance prior to the Appellate proceedings did not address mailboxes but rather prohibited all private structures but was interpreted and enforced by the City to allow mailboxes. However, the City's ordinance now in effect and applied to the Petitioner's structure by the Appellate Court specifically allows mailboxes provided they do not exceed 5 feet in height and are securely mounted on posts no larger than 4" x 4" or 4 1/2" diameter wood post or 2" diameter standard steel or aluminum pipe buried no more than 24" in the ground. Thus the ordinance applies equally to all private structures located in the public right of way and is content neutral.

The ordinance merely prohibits private structures on public right of way. The effect of the ordinance is no greater than necessary to accomplish the City's purpose which is to keep public right of way available for its public purpose. The Petitioner is free to get his message across to whomever he desires by placing his structure on his private property in compliance with all applicable zoning and building codes and therefore the Petitioner and all others similarly situated are not foreclosed from exercising their freedom of expression provided they do so outside of the public right of way or within the size limitations for mail receptacles which are placed on the public right of way.

The City's ordinance meets the test set forth in *O'Brien* and while the ordinance may incidentally infringe on the Petitioner's desire to place a symbol in public right of way the fact that the ordinance presents a First Amendment issue is not necessarily to say it constitutes a First Amendment violation, *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 561, 101 S.Ct. 2882, 2920 (1981).

CONCLUSION

For the reasons stated, this Court should deny to issue a Writ of Certiorari to review the judgment of the Court below.

Respectfully submitted,

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